

Why Federal – State –Local Partnerships are The Answer to America’s High-Level Nuclear Waste Interim Storage and Permanent Disposal Dilemma

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Introduction

From 1996 until 2006, I served as a contract attorney and senior advisor to the operator of the WIPP Facility and DOE. My exclusive focus was helping craft, then using and modifying the very elaborate series of regulatory and contractual agreements with many different arms of the State of New Mexico which enabled WIPP to open and operate. I came to this supremely fascinating and rewarding work as a Land Use and Zoning lawyer with over 20 years experience in getting large and small projects approved through the regulatory thicket of local, state and federal requirements that is American Land Use Law.

New Mexico only agreed to open WIPP after a 20 year battle created the equivalent of a very beneficial partnership. This included an independent federal agency review by EPA, iron clad guarantees on what materials could be deposited at WIPP, and more than 5000 pages of independent state agency regulations of the facility, including elaborate pre-testing of all waste to be emplaced there. DOE even agreed that the non-mixed waste to be disposed of at WIPP, which was not subject to State Regulation by federal law, would still be managed according to the requirement of the state permit. The agreements between the state and federal government included a detailed consultation and cooperation agreement, agreements for State and local compensation for roads, emergency responders and many other expenses, review under RCRA by the State and many other benefits - a near partnership. Many of these elements were written into federal law in the Land Withdrawal Act.

Because of my professional experience, I was comfortable with the reality of this arrangement. I was accustomed to the imposition of all sorts of State and local requirements and financial payments as conditions on proposed for development of land uses perceived as far less dangerous than nuclear waste.— some required by law, but many not. In 1996, much of DOE was still very unhappy with the terms of the partnership. They resented the requirements of the state hazardous waste permit and the exhaustive State transportation inspections of each truck shipment which seemed to be a betrayal of DOE’s exclusive control of all nuclear materials.

As the facility prepared for opening, then commenced operation, able agency leadership recognized the State’s rightful role in the success for the venture, and led the way to WIPP’s success.

In my view, the BRC Disposal subcommittee report draft does not recognize WIPP's most important lesson: in the creation of any new interim or permanent facility for storage and disposal of high-level nuclear waste, any state will demand equal control with the Federal Government over what is perceived by the public as the most dangerous land use in world.

The Nuclear Waste Policy Act ("NWPA") as originally adopted had a scientific model of selection with numerous provisions for state and local participation and consultation as vital stakeholders. The federal government radically changed this model to "The Federal Government knows best no matter what the State where the facility is located may think"

No State will ever again trust the federal government to write any aspect of a site selection process by itself. Before any State even thinks about the possibility of locating a storage or disposal facility, it will want to participate in determining the process of development and operation of a site -writing the rules from the beginning on an equal basis as feds. Canada, Sweden, Finland can get away with a fed designed process because they don't have the 10th amendment to the US Constitution, which reserves to the States all powers which are not Federal, or the US history of local and state control of land use restrictions.

Only by creation of partnerships between Federal-State- and Local Governments will any interim and permanent High level Nuclear Waste disposal facilities be opened and operated.

The first part of this paper describes a process for creating these partnerships. The second section discusses Richard Moore's paper prepared for the Commission – "Enhancing the Role of State and Local Governments in America's Nuclear Future: an Idea Whose Time Has Come" and the Disposal Subcommittee's June 1 Draft Recommendations in relation to my proposal. The conclusion proposes a recommendation for the Subcommittee's report.

A Process for Creating Partnerships for High-Level Waste Interim Storage and
Permanent Disposal.

1. The Secretary of the Department of Energy will write a letter to the Governors of all 50 States containing the following provisions:
 - DOE wishes to develop one or more interim storage facilities and permanent deep geologic facilities for the safe storage and disposal of high-level nuclear waste.
 - DOE intends to create partnerships with States, and local governments (including Native American tribes) to license, construct and operate these facilities.
 - DOE seeks States, and local governments or tribes within those States, which are interested in exploring, without any preconditions, the possibility of entering into negotiations for the creation of such a partnership.
 - DOE recognizes that part of this partnership creation process will be negotiations with a number of additional States to reach agreement on a transportation system for waste to be carried from existing locations to any new facilities. DOE hopes to model this process on that used to produce the Western Governor's Association WIPP Transportation Safety Program Implementation Guide.
2. For all States, and localities within those States, which express an interest in investigating the possibility of a partnership to develop an interim or permanent facility, In cooperation with the State and Locality, DOE will investigate whether there is a site within the State that has technically suitable geologic media and is otherwise worthy of serious investigation. DOE will advance to the State and to the local government or Native-American Tribe having jurisdiction over the location or locations identified sufficient funds for them to make their own independent determination, and to explore whether or not they are interested in entering into negotiations with DOE to create a partnership.
3. In order for negotiations to commence on the actual terms of any potential partnership, DOE, the State, and the locality or tribe must all formally agree to proceed. Because it is anticipated that any partnership will require both Federal and State legislation to implemented, the expression of State consent to begin negotiations must include state legislature, and the state's entire congressional delegation. It is anticipated that DOE will pay for State, Local, and Tribe costs of

negotiation. The terms of the Partnership will include the transportation access, design, development, construction, operation and regulation of the facility, and financial arrangements among the participants.

4. As discussed above, Federal and State legislation will be required to implement any agreement.

Why DOE initiate a new process when the Subcommittee report appropriately calls for the creation of a new entity to develop and operate the entire nuclear waste disposal process?

Just as the Committee calls for continued research on various geologic issues and other non-site specific tasks during the period it will take to create and pass legislation and organize the entity, DOE can begin the process of defining what it will take to get States and localities to join in the new entity's efforts. When it is created, the new body can replace DOE in the negotiations- which are very likely to take several years.

Comments on The Disposal Subcommittee Report and "Enhancing the Role of State and Local Government"

The most important defect in the Subcommittee's recommendations is that it fails to recommend that the States must be included as equal partners with the Federal Government in the negotiation of not just where a facility will be located but what process will be followed in the determination of disposal and storage facility siting.

The Disposal Subcommittee Recommendation #4 calls for "a new approach to site and develop" facilities with the features so lacking in the NWPA that are found in the Swedish, Finish and Canadian systems. #2 recognizes that there is now so little trust in DOE that an entirely new entity is required to take over the US nuclear waste disposal effort.

However, Recommendation #6, Roles and Responsibilities of State, Local, and Tribal Government, settles for substantially less than a fresh approach, and far short of the partnership status which will be required to entice State Government participation. It calls for only a "meaningful consultation" role, while specifying a regulatory role only "where appropriate". It is clearly worried about giving the States too much of a veto power, and falls back into the classic DOE position of (1) emphasizing the exclusive authority of the Federal Government to regulate radio-nuclides, and (2) worrying about giving the States the ability to "increas(e) the potential for further conflict, confusion and delay".

The recommendation correctly cites New Mexico permitting authority over WIPP (its veto power over the project!) as a critical element in its success. However, it sites the State scientific EEG review group as a key element of success- and implies that a similar arrangement would help persuade States to participate in a high-level waste process.

Independent state review of Federal scientific proposals will not be an adequate substitute for state control.

Comments on Richard Moore's "Enhancing the Role of State Governments in America's Nuclear Future"

Richard Moore's paper contains a wealth of information on the past involvement of State and Localities in the development of Nuclear Waste Facilities. He also believes that the State's role in the process of developing facilities

can probably only be accomplished successfully by involving the key stakeholders in the process of developing the appropriate approach. The model used the Western Governors to initiate the development of the WIPP safe transportation program could be used to develop a system for state and local government participation in the nuclear waste facility regulatory system

Like the Subcommittee draft, he fails to grasp the implications of the reality described in his report. In spite of the catalogue of almost complete failure to obtain State support for previous efforts, he calls for a greater role for States and localities, but much less than a full partnership in developing the entire process. Once again we are urged to have the Federal Government create another process to define how sites are scientifically selected and States roles are defined, albeit with Governors participating as "Stakeholders"

Moore advocates the use of the model used by the Western Governors to initiate the development of the WIPP transportation program to develop a system for state and local participation in the nuclear waste facility regulatory system. This is indeed a proven model for development of the transportation element of an interim storage or permanent facility location is identified. However, it's not realistic to think that any state will allow any other state or states to define what regulatory, financial, and other commitments it will require in for a facility in that state.

Moore does use the word "Partners" once when referring to states which have become de facto storage sites through decommissioning of reactors:

If states that have a stake in finding a solution to the problem are empowered to be partners in the effort of solving a mutual problem, they may be willing together with similar interests and the federal government

The question which Moore does not answer is: what evidence is there that States will accept anything less than full partnership?

Conclusion

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Is there any doubt that the most serious obstacle to the development of a program for the storage and disposal of high-level nuclear waste is the refusal of any state to support the creation of any of these facilities within its borders?

The issue before the BRC, the President, and Congress is perceived by almost everyone as “How can the Federal Government construct a process which can successfully develop interim and permanent nuclear waste storage and disposal sites?”

I believe the real question is- “How can The Federal Government create a process in which State Governments will agree to permit these facilities to exist in their states”

Before the process of designing a new system for creating these facilities goes any further, isn't it time to treat the States now as the equal partners they must be in the future if the new system is to be successful?

Recommendation #6a should be included, to read as follows:

State, local, and tribal governments are essential participants with the federal government in the development of (1) the process for location of high-level nuclear waste storage and disposal facilities, and(2) the siting and operation of facilities under that process. In order to have any chance of persuading them to participate in solutions to these issues, they need to be treated as equal partners. The site selection model where the Federal Government determines possible sites and then forces or tries to convince a locality and state to accept it must be replaced by willing Federal, State and Local Partners jointly deciding what sites storing what materials should be located in what places. The Department of Energy should begin by contact each state governor and each tribe to determine if they are interested in entering into discussions, without any preconditions, with DOE about the possibility of creating a partnership with the DOE and a locality or tribe for an interim or permanent storage facility. If a new entity is created to manage high level waste, it can replace DOE in the development process.

The following Recommendation # _____ should be added to the draft report: